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No. 10-548

IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., *et al.*,
Petitioners,

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* NEW KAISER VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION IN SUPPORT OF PETITIONERS

ROBERT M. DOHRMANN
Counsel of Record
SCHWARTZ, STEINSAPIR,
DOHRMANN & SOMMERS LLP
6300 Wilshire Blvd., Suite 2000
Los Angeles, CA 90048
(323) 655-4700
rmd@ssdslaw.com

Attorney for *Amicus Curiae*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

New Kaiser Voluntary Employees' Beneficiary Association ("VEBA") hereby respectfully moves for leave to file its Brief *Amicus Curiae* in this case. The brief was filed with the Court on November 24, 2010. The consent of counsel for all parties, save one, has been obtained. The consent of counsel for Respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice was requested but their counsel has made no response to the request.

The interest of the VEBA in this case arises from the fact it is a non profit trust of former steel workers and their dependents who lost lifetime medical, death and disability benefits during the 1987 bankruptcy of Kaiser Steel Corporation. When VEBA first became

involved in the Eagle Mountain project in June 1988, it had approximately 7,000 members. Today, VEBA has approximately 3,000 members, most whom reside in Riverside County, California where the Eagle Mountain landfill will be located. As VEBA's chairman commented during the public hearings on this project, for the VEBA members this project represents the last opportunity to restore full medical, death and disability benefits for VEBA's members. This is because VEBA holds approximately ten percent of the beneficial units of Kaiser Ventures, LLC, the parent organization of Petitioners. For those remaining members, a project delayed is a project and benefits denied. The average age of the members is now 80, and they simply cannot wait another ten or twenty years.

The VEBA's *amicus* brief presents to the Court useful information regarding the potential impact of the decision below not only on Petitioners but also on the broader community in Southern California that will be served by the proposed Eagle Mountain Landfill Project. It is believed that VEBA's *amicus* brief contains relevant argument that will assist the Court in determining whether to grant the Petition.

Respectfully submitted,

ROBERT M. DOHRMANN
Counsel of Record
SCHWARTZ, STEINSAPIR,
DOHRMANN & SOMMERS LLP
6300 Wilshire Blvd., Suite 2000
Los Angeles, CA 90048
(323) 655-4700
rmd@ssdslaw.com
Attorney for *Amicus Curiae*

November 24, 2010

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF THE *AMICUS CURIAE*	1
ARGUMENT	4
I. CONTRARY TO EXTANT NINTH CIRCUIT PRECEDENT, THE DECISION BELOW FAILS TO APPLY A "RULE OF REASON" IN ITS REVIEW OF AGENCY DECISIONS	5
II. PERCEIVED FLAWS IN AN EIS ARE NOT, ALONE, SUFFICIENT TO CAUSE REMAND TO THE AGENCIES	6
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Cady v. Morton, 527 F.2d 786 (9th Cir. 1975)	6
Churchill County v. Norton, 276 F.3d 1060 (9th Cir. 2002)	5
National Parks & Conservation Association v. Kaiser Eagle Mountain Inc., 606 F.3d 1058 (9th Cir. 2009)	2, 3, 4
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969)	4, 7

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BRIEF OF *AMICUS CURIAE* NEW KAISER VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

New Kaiser Voluntary Employees' Beneficiary Association ("VEBA") is a non-profit trust of retirees and their dependents who lost lifetime medical, death

[1] The parties were provided with timely notice of the intent to file this brief. The consent of counsel for all parties, save one, has been obtained. The consent of counsel for Respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice was requested, but their counsel has made no response to the request. Our Motion for Leave to file this Brief is appended hereto. Counsel for a party did not author this brief in whole or in part. No person or entity other than *Amicus Curiae* made a monetary contribution to the preparation and submission of this brief.

and disability benefits during the 1987 bankruptcy of Kaiser Steel Corporation. Those benefits are now provided by VEBA using funds it acquires from Kaiser Ventures LLC, the parent organization of Petitioners Kaiser Eagle Mountain, Inc. and Mine Reclamation Corporation (now, respectively, Kaiser Eagle Mountain LLC and Mine Reclamation LLC).

During the period from 1948 to 1983, Kaiser Steel Corporation mined iron ore on Eagle Mountain and transported it to its foundry in Fontana, California. Upon cessation of its steel making activities, a large open pit mine had been created by the mining activities. It is that cavity on the earth's surface that Petitioners in this litigation have been attempting, for over twenty years, to achieve regulatory permitting so that they may operate the site as a Sanitary Landfill. The project and its extent, 4,654 acres with a designed capacity of 117 years, is described in the Ninth Circuit's published opinion. *See*, *National Parks & Conservation Association v. Kaiser Eagle Mountain Inc.*, 606 F.3d 1059, 1062 (9th Cir. 2009) (Majority Opinion by Judge Pregerson,), 1076 (Judge Trott dissenting, noting the endeavor has so far cost Petitioners over $50,000,000).

VEBA first became involved in the Eagle Mountain project as a part of the Kaiser Steel Corporation Bankruptcy Plan of Reorganization. In June 1988, it had approximately 7,000 members. Today, VEBA has approximately 3,700 members, a large number of whom reside in Riverside County, California. As VEBA's Chairman commented during the public hearings on this project, for the VEBA members this project represents the last opportunity to protect full restoration of benefits for VEBA's members. This is because of two factors:

First, VEBA cannot provide full health care to its participants, as had been promised by the former Kaiser Steel Corporation, as funds are inadequate to do so without proceeds from the VEBA's interest in the company. Consequently, members still have substantial health care expenses to pay for out of pocket, even as they subsist on modest retirement incomes and despite the fact their former employer promised them lifetime health care.

Second, VEBA holds approximately 10% of the beneficial units of Kaiser Ventures LLC, Petitioners' parent. The revenues that will be received from such users of the landfill as the Los Angeles County Sanitation Districts (which has agreed to pay over $40,000,000 for use of the facility), when realized as income to the beneficial interest holders, will allow VEBA to cover far more of its members' health-related expenses than it now can.

And the census figures tell a grim story: the average age of VEBA members is now 80. For those remaining members, a project delayed means a project and benefits denied. Based on actuarial studies, the current population's attrition rate will accelerate in the very near future. These people simply cannot wait another ten or twenty years for their benefits.

The decision of the Ninth Circuit ensures that the public will never realize the many important benefits of the project. Instead, the project will take on an "eternal life of its own," as Judge Trott notes. (*National Parks & Conservation Association v. Kaiser Eagle Mountain Inc.*, 606 F.3d 1058, 1078.) VEBA members and members of the public and regional interests have invested over a decade in analyzing the Eagle Mountain project, speaking at various

public meetings, submitting written comments, and developing (and redeveloping) plans for completion of the project. Sending the Bureau of Land Management back to the drawing board once again will cost this region, its businesses, and its residents (notably including VEBA members) many more years of lost revenue and opportunities for economic development. There has been more than enough agency decision-making and public participation to assure the proper vetting of the project. To continue on this treadmill is in the words of Judge Trott: "sending the parties back to a Sisyphean hill which cannot be climbed in a lifetime." (*Id.*)

The Court should grant the Writ so that the project can finally proceed as intended.

ARGUMENT

The Ninth Circuit has reviewed many District Court decisions that in turn have considered Agency conclusions in matters similar to those involved in this matter. The body of that decisional law has been largely consonant with the decisions of other Circuits on the scope of review to be accorded the Agencies' determinations. Petitioners have presented the Court with a detailed analysis of the decisions of other Circuits and this Court's decision in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (rejecting the invitation to "convert judicial review of agency action into a ping pong game"). Those decisions advocate persuasively that the Ninth Circuit's decision in this case is not in balance with those better-reasoned decisions. The VEBA does not here repeat those arguments. But we do call to the Court's attention that precedent in the Ninth Circuit is contrary to the decision of the court below in this case.

I. CONTRARY TO EXTANT NINTH CIRCUIT PRECEDENT, THE DECISION BELOW FAILS TO APPLY A "RULE OF REASON" IN ITS REVIEW OF AGENCY DECISIONS.

Several decisions of the Ninth Circuit have applied a "rule of reason" standard when reviewing the adequacy of an agency's environmental impact statement for purposes of the National Environmental Policy Act ("NEPA"), under which the court asks whether an Environmental Impact Statement ("EIS") contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. *See, e.g., Churchill County v. Norton*, 276 F.3d 1060, 1071, 1081 (9th Cir. 2002) (Opinion by Judge Paez):

> Review under the rule of reason and for abuse of discretion "are essentially the same." (Citations omitted.)
>
> . . . Under this standard, we ask "whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. (Citation omitted.) [W]e make "a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Id.* Review under the rule of reason and for abuse of discretion "are essentially the same." (Citations omitted.) (276 F.3d at 1071)
>
> Plaintiffs have pointed out errors and missing information in the [Water Rights Acquisition for Lahontan Valley Wetlands, Churchill County, Nevada] WEIS. We could certainly "fly-speck" this chapter of the WEIS and find instances where the inclusion of quantitative data would

benefit the Service and the public. As with the programmatic EIS discussed above, if we were preparing the WEIS, we might insist on additional detail. That is not our role, of course. Rather, we review the legal sufficiency of the WEIS. We conclude that the Fish and Wildlife Service has taken the requisite "hard look" at the cumulative environmental impacts of the action alternatives and has not violated NEPA. (276 F.3d at 1081)

II. PERCEIVED FLAWS IN AN EIS ARE NOT, ALONE, SUFFICIENT TO CAUSE REMAND TO THE AGENCIES.

In *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975), the court made this point emphatically:

> While we would have preferred a somewhat more detailed and better organized treatment of the proposed reclamation plans and although parts of the discussion are couched in the 'conclusory form' we consider less than optimal, we cannot say that the EIS is inadequate in this regard.
>
> Neither [NEPA] Section 102(2)(B) or (C) (42 U.S.C. § 4332(2)(B) or (C)) can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated." (527 F.2d at 796)

CONCLUSION

Because the decision below is so irreconcilable with the decisions of other Circuits and within the Ninth Circuit, as well as with the view of this Court in *NLRB v. Wyman-Gordon Co.*, *supra*, and because it threatens to make environmental litigation endless, the Court should grant the Petition.

Respectfully submitted,

ROBERT M. DOHRMANN
Counsel of Record
SCHWARTZ, STEINSAPIR,
DOHRMANN & SOMMERS LLP
6300 Wilshire Blvd., Suite 2000
Los Angeles, CA 90048
(323) 655-4700
rmd@ssdslaw.com

Attorney for *Amicus Curiae*

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